

November 8, 2004



FILED ELECTRONICALLY

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-B204
Washington, DC 20554

CG Docket No. 02-278

**Re: OPTIMA DIRECT, INC.'S COMMENTS IN SUPPORT OF
CCADVERTISING'S PETITION FOR EXPEDITED DECLARATORY
RULING**

Dear Ms. Dortch:

Optima Direct, Inc. ("ODI") respectfully submits these comments in support of ccAdvertising's Petition for an Expedited Declaratory Ruling to preempt certain provisions of the North Dakota Century Code which prohibit the dissemination of prerecorded messages during noncommercial interstate telephone calls, as these provisions are significantly more restrictive than the Commission's Rules and Regulations implementing the Telephone Consumer Protection Act of 1991.

I. Statement of Interest

ODI is the teleservices affiliate of Rapp Collins Worldwide, the world's largest integrated direct marketing agency and a member of the Omnicom Group. ODI, headquartered in Vienna, Virginia, manages a network of over 200 call centers and vendors across the United States, Canada and the Caribbean. ODI's diverse client base ranges from Fortune 500 companies to start-ups, including businesses in political, fundraising, financial service, insurance, retail, utilities, and consumer goods industries. ODI manages many direct marketing campaigns that employ interactive voice response speech recognition ("IVSR") technology, oftentimes using IVSR to collect polling information and to disseminate political messages.

North Dakota's Attorney General recently commenced an enforcement action against FreeEats.com, d/b/a ccAdvertising ("ccAdvertising"), claiming that its use of autodialed, prerecorded message technology to conduct political polling violates North Dakota Century Code § 51-28-02, which prohibits the use of prerecorded messages without authorization from the called party.

As ODI manages calling programs similar to that in which ccAdvertising engages, ODI is concerned that the North Dakota Attorney General seeks to enforce this statute against ccAdvertising, despite the fact that it is significantly more restrictive than the Commission Rules

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by prohibiting political polling, and imposes significantly higher compliance burdens and costs on marketers.¹

ODI manages its clients' compliance with all applicable state laws. Permitting states to implement and enforce more restrictive regulations on interstate telephone calls will require ODI and others to expend significantly higher compliance costs as they probe through the myriad of inconsistent state restrictions to determine compliance requirements. This will also cause confusion amongst both subscribers and those who initiate the telephone calls.

2. The Commission Rules

The North Dakota law is stricter than, and directly conflicts with, the Commission's revised Rules and Regulations Implementing the Telephone Consumer Protection Act ("TCPA") of 1991 ("Commission Rules") which expressly permit political polling calls using prerecorded messages.²

Specifically, the Commission Rules authorize entities to initiate telephone calls that disseminate a prerecorded message, provided that the telephone call:

- i) is for an emergency purpose;
- ii) is not made for a commercial purpose;
- iii) is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation;
- iv) is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation; or

¹ *In re Rules And Regulations Implementing The Telephone Consumer Protection Act of 1991*, CC Dkt. 92-90, Report and Order, 7 FCC Rcd. 8752, ¶41 ("We find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules.").

² *See Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 Fed. Reg. 44144, 44147 (July 25, 2003) (to be codified at 47 C.F.R. pt. 64, 68).

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v) is made by or on behalf of a tax exempt nonprofit organization.

Thus, the Commission Rules permit calls to conduct surveys, political polling and "get-out-the-vote" campaigns utilizing a prerecorded message since they are not made for a commercial purpose.³

3. The North Dakota Statute

Sections 51-28-01 and 51-28-02 of the North Dakota Century Code ("North Dakota Statute") read together prohibit the transmission of all prerecorded messages with the limited exceptions of: i) messages from school districts to students, parents or employees; ii) messages to subscribers with whom the caller has a current business relationship; or iii) messages advising employees of work schedules.⁴ **The North Dakota Statute restricting the use of prerecorded messages contains no exemption for noncommercial telephone calls to conduct surveys, political polling and "get-out-the-vote" campaigns.**

North Dakota's current regulatory scheme is costly, unduly burdensome and intrusive upon marketing practices. The North Dakota law imposes compliance burdens upon out-of-state businesses and direct marketers who initiate interstate telephone calls to North Dakota subscribers that are substantially above and beyond those imposed by the Commission Rules.

4. North Dakota's Limited Exemptions are Inconsistent with the Commission Rules and Should Be Preempted

In its 2003 rulemaking, the Commission opted not to restrict the use of prerecorded messages in non-commercial telephone calls.⁵ The Commission intended that its rules be the uniform rule of the land, recognizing the importance of supporting Congress' objective of creating uniform national rules:

Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear

³ *Id.*

⁴ N.D. Cent. Code § 51-28-02.

⁵ See 68 Fed. Reg. at 44147 (referencing H.R. Rep. No. 102-317 at 13, 102nd Cong., 1st Sess. (1991) ("[T]he Committee does not intend the term "telephone solicitation" to include public opinion polling, consumer or market surveys, or other survey research conducted by telephone.")).

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intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities.

We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted. We will consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis. Accordingly, any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission. We reiterate the interest in uniformity—as recognized by Congress—and encourage states to avoid subjecting telemarketers to inconsistent rules. [Emphasis added].⁶

The North Dakota Statute contravenes the clear intent of Congress to create uniform national rules, and to ensure that individual privacy rights and public safety interests are balanced with the legitimate interests of businesses to engage in free speech and trade. Instead, North Dakota's laws directly conflict with, and disregard, the same legitimate interests of the direct marketing industry that the Commission and Congress sought to preserve. This contradictory regulatory environment forces entities to comply with multiple inconsistent rules, and serves only to create undue burdens on interstate activities, increase compliance costs and create confusion among consumers and businesses alike.

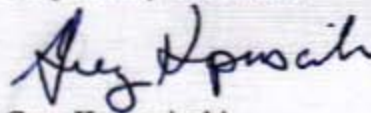
ODI is committed to ensuring that the direct marketing campaigns which involve interstate telephone calls which it manages comply with all applicable laws. However, ensuring compliance with heterogeneous state laws state imposes financial burdens on the industry, and creates confusion among consumers and business alike.

⁶ 68 Fed. Reg. at 44155.

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For the reasons cited herein, ODI supports ccAdvertising's petition, and urges the Commission to preempt those provisions of North Dakota's laws which are more restrictive than the Commission Rules.

Respectfully submitted,



Greg Kapuscinski
General Manager